TAMINA NAVIGATION LTD

v.

THE OWNER OF THE CARGO LADEN ON BOARD THE SHIP OR VESSEL MT "SWALLOW" (NEWICK SHIPPING LIMITED - INTERVENERS)

HIGH COURT SABAH & SARAWAK
CLEMENT SKINNER J
[ADMIRALTY IN REM NO: 27-04-2002-1]
9 AUGUST 2003

CIVIL PROCEDURE: *Appearance - Conditional - Admiralty action in rem - Filing of application to set aside writ - Whether requesting court to consider merits of cause of action - Whether submission to jurisdiction - Whether conditionality waived*

CIVIL PROCEDURE: *Locus standi - Intervener - Admiralty action in rem - Warrant of arrest on cargo on vessel - Application to set aside - Whether owner of cargo having any interest to protect - Whether having possessory lien for freight and demurrage*

JURISDICTION: *High Court - Admiralty jurisdiction - Jurisdiction to arrest cargo in action in rem - Whether could be exercised for purpose of providing security for awards in arbitration proceedings - Whether no legal basis for arrest of cargo - UK Supreme Court Act 1981 ss. 20(2)(h), 21(3), 21(4), 21(4)(b)(ii) - Rules of the High Court 1980 O. 18 r. 19, O. 70 r. 4(7) - Courts of Judicature Act 1964, s. 24(b)*

SHIPPING: *Action in rem - Admiralty jurisdiction - Arrest of cargo in action in rem - Whether could be effected for purpose of providing security for awards in arbitration proceedings - Arrest of cargo on vessel to secure claims in arbitration proceedings in London and claims for indemnity in Sri Lanka - Whether an abuse of process - UK Supreme Court Act 1981 ss. 20(2)(h), 21(3), 21(4), 21(4)(b)(ii) - Rules of the High Court 1980 O. 18 r. 19, O. 70 r. 4(7) - Courts of Judicature Act 1964, s. 24(b)*

The plaintiff had chartered its vessel ('the Exeter') to Ceylon Petroleum Corporation to carry a cargo of crude oil to Colombo, Sri Lanka. Upon discharge of the cargo at the defendant's mooring in Colombo, the Exeter collided with the mooring resulting in damage to the vessel, delay in the

discharge and a suit by the defendant claiming for damages, loss of profit and demurrage. The plaintiff sought to challenge the jurisdiction of the Sri Lankan court to hear the claims, but pending that, filed arbitration proceedings in London pursuant to the terms of the charterparty. And thus, by an interim final award dated 20 July 2000, the arbitrators ruled that the claims were referable to arbitration and awarded cost to the plaintiff.

The defendant, in the meanwhile, had purchased some 40,000 tonnes of crude oil from Petronas to be laden on board the vessel MT 'Swallow' ('the Swallow") at the Port of Miri, Sarawak. That being so, on 28 September 2002, the plaintiff, in an effort to seek indemnity for damage suffered to the Exeter, and satisfaction of the arbitrators' award, issued a writ action *in rem* against the "cargo laden on board the Swallow" as well as a warrant of arrest against the said cargo. The facts showed however that no cargo was laden on board the Swallow on 28 September 2002, and it was not until 1 October 2002 that loading had taken place (thereby passing the property in the cargo to the defendant).

Be that as it may, the defendant entered a conditional appearance and applied to set aside the warrant of arrest. Subsequently, leave to intervene was also granted to the owners of the Swallow who, likewise, filed a conditional appearance and applied to set aside the warrant of arrest. Both applications were allowed by the learned Senior Assistant Registrar whereupon the writ was set aside, the arrest of the cargo lifted and damages for the arrest assessed and ordered paid to the defendant and the intervener. The plaintiff appealed and argued, *inter alia*, that: (i) the court's refusal to grant an adjournment of the hearing was prejudicial to its case; (ii) the defendant, by requiring the court to consider the merits of the plaintiff's cause of action through its application to set aside, had waived the conditionality of its appearance (iii) its claim had given rise to a maritime lien, bearing in mind its invocation of s. 20(2)(h) of the United Kingdom Supreme Court Act 1981 ('SCA'); and (iv) the intervener had no *locus standi* to proceed against the plaintiff

Held (dismissing the appeal):

[1] The interest of justice would not have been served by the grant of an adjournment in the circumstances of this case. The Swallow lay at anchorage at Miri laden with a substantial amount of crude oil but was unable to sail because of the arrest of the cargo on board. Every day the vessel lay at anchorage considerable expenses were mounting. By the time the application came up for hearing, 15 days had lapsed since the arrest was effected. There was therefore a real urgency for the application to be heard. (pp 774 h & 775 a)

[2] When the court entered a consideration of the defendant's setting aside application, it was not being asked to exercise summary jurisdiction under O. 18 r. 19 and therefore the question of the defendant blowing hot and cold or the court being asked to apply its mind to different considerations in a single application did not arise. More importantly, when the defendant raised the jurisdiction issue, the point it was taking was that the admiralty jurisdiction of this court is statutory and being statutory, the limits of its jurisdiction were circumscribed by the statute which conferred that jurisdiction. It was the defendant's case, which the court agrees, that if this court lacked admiralty jurisdiction to arrest cargo in the circumstances of this case, such lack of jurisdiction could not be waived or even made good by an unconditional appearance or submission to the jurisdiction. (p 777 c-e)

[3] The only relevant provision within which the plaintiff's claim would come into is s. 21(4) of the SCA which encompasses claims mentioned in s. 20(2)(e) to (r). Reading subsection (4), it was clear that the jurisdiction of the court could only be invoked by an action *in rem* against a vessel and not against any other property. The subsection did not mention cargo at all. Although the plaintiff's claim could fall within s. 20(2)(h) and that the defendant would be the 'relevant person' for the purposes of s. 21(4)(b), the requirement of s. 21(4)(b)(ii), namely that the claim was being brought against "any other ship which at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it" simply could not be met. (pp 782 g-h & 783 a-d)

[3a] Consequently, the defendant was correct in its contention that for a claim under s. 20(2)(h) the admiralty jurisdiction of the High Court could not be invoked against the cargo. In having done so in this instance, the court was exercising jurisdiction it did not possess. On this ground alone the writ and the warrant of arrest could be set aside. (p 783 h)

[4] The plaintiff's claim as endorsed on the writ showed that nowhere did the plaintiff plead the arbitration agreement. Without having done so it could not be said that both the essential elements in its cause of action had been pleaded to found an action on the award, let alone to arrest a cargo on that basis. (p 786 c)

[5] The plaintiff, in issuing the writ *in rem*, had abused the process of the court. This was because the admiralty jurisdiction of the High Court could not be exercised to obtain security for a claim in arbitration. Further,

the contention that the court ought to exercise its admiralty jurisdiction to arrest the cargo in enforcement of the interim final award of the arbitrators as to costs was untenable. It would be contrary to s. 21(3) SCA as the plaintiff had no maritime lien or other charge on the arrested cargo. (pp 787 e-f, 789 a, 791 a-b & 792 d)

[6] Although the plaintiff did disclose the interim final award, it had abused the process of court in obtaining an arrest of the cargo when it failed to make full and frank disclosure of far more material facts pertaining to the arbitration proceedings in London. Nowhere was it disclosed that the London arbitration was being actively pursued and that the arrest was to obtain security for it. This aside, there was no defendant in existence at the time of the issue of the writ and warrant of arrest on 28 September 2002 since loading only commenced on 1 October 2002. There was therefore no basis for invoking the *in rem* jurisdiction at that time. (p 793 c-f)

[7] The interveners had the *locus standi* to apply to set aside the writ. As shipowners, their interest in the arrested cargo lay in their possessory lien for freight and demurrage. Further they had an interest to deliver the said cargo to collect freight from the shipper, *ie*, the defendant. Clearly, the interveners had an interest to protect. (p 800 g-h)

Case(s) referred to:

Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the ship or vessel "Normar Splendour" [1999] 7 CLJ 213 HC ***(foll)***
The 'Mawa' now named "Mara" [1988] 2 Lloyd's Rep 459 ***(foll)***
Bangkok Bank Ltd v. Weil Bros Cotton Inc. [1977] 2 MLJ 134 ***(dist)***
Bremer Oeltransport GmbH V Drewry [1933] 1 KB 753 ***(not foll)***
Kawasaki Kisen Kaisha Ltd v. Owners of the Ship or Vessel "Able Lieutenant" [2002] 6 MLJ 433 ***(refd)***
Mohanlal Gordhandas Sheth v. Ban Guan & Co [1956] 22 MLJ 13 ***(refd)***
Pemunya Kapal MV Brihope v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 CA ***(refd)***
PP Persero Sdn Bhd v. Bimacom Property & Development Sdn Bhd [1999] 6 CLJ 275 HC ***(refd)***
Samic Lines Co Ltd v. Owners of the 'Antonis P Lemos' Lord Brandon [1985] 2 WLR 468 ***(refd)***
The Beldis [1936] P 51 ***(foll)***
The "San 003" [1979] 2 MLJ 8 ***(not foll)***
The Andria [1984] 1 All ER 1126 ***(refd)***
The Bumbesti [1999] 2 Lloyds Rep 481 ***(foll)***
The Byzation [1922] 16 Asp MLC 18 ***(dist)***

The Evangelismos 14 ER 945 ***(refd)***
The Fierbinti [1994] 3 SLR 864 ***(dist)***
The Fordeco [2000] 1 CLJ 605 ***(dist)***
The Hull 308 [1991] 1 SCR 304 ***(foll)***
The Ohm Mariana [1992] 2 SLR 623 ***(refd)***
The Rena K [1979] 1 All ER 397 ***(dist)***
The Saint Anna [1983] 1 WLR 895 ***(not foll)***
The Tuyuti [1984] 2 All ER 543 ***(refd)***
The Vasso (formerly Andria) [1984] 1 Lloyds L-R, 235 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, s. 24(b)
Rules of the High Court 1980, O. 18 r. 19, O. 32 rr. 2, 3, 13(2), O. 70 r. 4(6)(b), 4(7)

Supreme Court Act 1981 [UK], ss. 20(1), (2)(a), (b), (c), (e)-(s), 21(1), (2), (3), (4), (4)(b)(ii), (5), 22, 23, 24

Other source(s) referred to:
Malaysian High Court Practice 2001, desk edn, p 2173
Migel Meeson, *Admiralty Judisdiction and Practice*, pp. 69, 144

For the plaintiff - Stanley Eddy; M/s Battenberg & Talma
For the defendant - Bong Ah Loi; M/s Bong & Co
For the interveners - Leonard Shim; M/s Reddi & Co

Reported by WA Sharif

JUDGMENT

Clement Skinner J:

This is the hearing of an appeal brought by the plaintiff against the decision of the learned Deputy Registrar given on 15 October 2002 ordering that:

(1) the plaintiff's writ be set aside and the cargo under arrest be released forthwith;

(2) damages for arrest of the cargo be assessed and paid to the defendant;

(3) the plaintiff's application to amend the warrant of arrest be dismissed with costs;

(4) the intervener's application to dismiss the plaintiff's action and to set aside the warrant of arrest against the cargo be allowed;

(5) damages be assessed and paid to the intervener.

At the outset, the plaintiff indicated that it would not be pursuing its appeal in respect of its application to amend the warrant of arrest save for the issue of costs.

The facts leading up to the Deputy Registrar's decision are these.

By a charterparty on an amended Asbatankvoy form dated 30 April 1997, the plaintiff chartered its vessel "Exeter" to the Ceylon Petroleum Corporation (hereafter 'the defendant') to carry a cargo of crude oil from one safe port Ras Tanura to Colombo on the terms and conditions therein set out. At Colombo the cargo was to be discharged at a single buoy mooring ("SBM") belonging to the defendant.

The vessel collided with the SBM during the course of the mooring operation on 19 May 1997. Damage was suffered by the vessel. There was a delay in the discharge of the cargo which was finally completed only on 8 June 1997. The reasons for the delay are in dispute between the parties. The defendant commenced proceedings in the Sri Lankan High Court in which, as owners of the SBM, they claimed damage to the SBM, consequential losses comprising cancelled export orders, loss of profit in respect of finished products and demurrage arising from delay to other vessels. The defendant's claims amount to some USD1.1 million. In bringing its claim, the defendant contended that the collision between the vessel and the SBM had been caused by negligence on the part of the Master, crew and/or servants or agents of the plaintiff.

The defendant then arrested the Exeter while still at Colombo whereafter the plaintiff obtained her release in return for a bank guarantee for USD2,200,000.

The charterparty contained a clause which provided for disputes to be referred to arbitration in London, so it was contended by the plaintiff in the court at Colombo that the Colombo Court had no jurisdiction in respect of defendant's claim which should properly be brought in arbitration under the provisions of the arbitration clause in the Charterparty. That challenge was rejected by the Sri Lankan High Court and is presently subject to appeal. If that appeal fails the plaintiff will be exposed to an action on the merits before the Sri Lankan court.

In the meantime, the plaintiff commenced arbitration proceedings in London in which it contended that the incident had been caused by the negligence of the mooring masters for whose acts, it said, the Charterers ie, the defendant, were responsible. The plaintiff claimed demurrage, repair costs, and damages for detention. The plaintiff's claim amount to some USD685,719.73. So far as

the proceedings in Sri Lanka were concerned, the plaintiff contended that the defendant were in breach of the arbitration clause in seeking to have the merits decided in Sri Lanka and claimed damages or an indemnity.

In response to the arbitration commenced in London, the defendant argued that the plaintiff was estopped from contending that the claims brought by it before the court in Sri Lanka were referable to arbitration pursuant to the arbitration clause since that issue had already been determined in proceedings between the defendant and the plaintiff before the Sri Lanka High Court.

In any event, the defendant maintained that their claims before the Sri Lankan court were not referable to arbitration because they did not arise out of the charterparty and so not subject to the arbitration clause.

So the position was that each side denied liability for their opponents' claims and challenged the jurisdiction of the Tribunals in which their opponents' claim had been brought.

In these circumstances, the plaintiff requested the arbitrators in London to determine four questions regarding the institution of the Sri Lankan proceedings by the defendant, as preliminary issues. On 20 July 2000 the arbitrators issued and published as their Interim Final Award, their decision on two of the four questions referred to them. They held that:

(i) the plaintiff was not estopped from contending that the claims put before the Sri Lankan court by the defendant are referable to arbitration in London;

(ii) the claims brought by the defendant before the High Court of Sri Lanka are referable to arbitration pursuant to the Charterparty arbitration clause.

The arbitrators decided to stand over the two other questions referred to them. They also awarded costs of GBP17,720.58 to the plaintiff in respect of the determination of the preliminary issues. That award has not been satisfied or paid by the defendant.

On 28 September 2002 the plaintiff caused to be issued out of the Registry of this court a writ of summons in an action *in rem* against the cargo laden on board the ship or vessel MT "Swallow". The indorsement of claim on the writ shows that the plaintiff's claim arises under the amended Asbatankvoy form Charterparty entered into between the plaintiff and the defendant, on 30 April 1997, for the carriage of a cargo of crude oil from Ras Tanura to SBM Colombo on the "Exeter". The plaintiff's claim is for an indemnity under

the Charterparty for damage suffered to the "Exeter", and/or for loss, expenses and damages as a result of damage to the "Exeter" and/or demurrage pursuant to the Charterparty.

On the same day, ie, 28 September 2002, the plaintiff obtained a warrant of arrest to arrest the cargo laden on board the vessel MT "Swallow" at the Port of Miri, Sarawak. The affidavit to lead the warrant of arrest was affirmed by Mr. John Jussem on 28 September 2002 (hereafter Mr. Jussem's affidavit) and he stated that the cargo was being arrested to enforce payment of the plaintiff's claim for collision damage, demurrage and detention under the Charterparty. Mr. Jussem also states that the "plaintiff further claims from the defendant for an arbitration award for costs of GBP17,720.58 as provided under the Interim Final Award dated 20 July 2000", a copy of which was exhibited to his affidavit as 'JJ2'.

The cargo which the plaintiff sought to arrest consisted of some 40,000 tonnes of light crude oil. Mr. Jussem states that he was informed by the Miri Port Authority that the ship's agent of the M.T. "Swallow" had submitted a notification of arrival informing that "the said vessel will be loading 40,000 tonnes of light crude oil on 28 September 2002 at 12.00 noon".

The 40,000 tonnes of light crude oil was sold by the Malaysian oil corporation Petronas to the defendant under the terms of an agreement, art. 6 of which stipulates that transfer of title and risk will only pass from Seller to Buyer when the oil passes the flange connection between delivery hose at the loading port and the vessel's permanent hose connection.

Following the issue of the warrant of arrest, the Bailiff of the High Court Kuching, accompanied by two lawyers acting for the plaintiff proceed to Miri to effect the arrest of the cargo. On arrival there on the evening of 28 September 2002 the Bailiff discovered that the cargo of crude oil was yet to be loaded on the vessel which was still at the Miri anchorage so he returned to Kuching on 29 September 2002, but the two lawyers apparently remained at Miri and waited for the cargo to be loaded on board the vessel. The court Bailiff returned to Miri on 1 October 2002 and effected an arrest of the cargo. It is now known that the MT. "Swallow" arrived Miri on 26 September at about 1800 hours. Notice of Readiness to load cargo was tendered at 0001 hours on 29 September 2002 and loading of the cargo commenced at 0006 hours on 1 October 2002. Loading was completed at 2100 hours on 1 October and hoses were disconnected at 2215 hours on the same day. The cargo documents came on board in the early hours of 2nd October 2002 morning and the vessel was ready to sail for Colombo, Sri Lanka, but

unable to obtain port clearance from Miri Port due to the plaintiff's arrest of the cargo on board the vessel. (See the affidavit of Despina Chrissi Glyki affirmed on 11 October 2002 on behalf of the Interveners).

Following the arrest of the cargo on board the vessel, the defendant entered a Conditional Appearance on 7 October 2002 and on the same day filed an application to strike off the writ and further or alternatively to set aside the warrant of arrest (hereafter "the defendant's striking out application"). The defendant's application was supported by an affidavit affirmed by K Kaluaratchi on 3 October 2002 (hereafter "Ms. Kaluaratchi's affidavit"). The defendant's striking out application was fixed for hearing before the Deputy Registrar on 15 October 2002. On 9 October a copy of the defendant's striking out application together with Ms. Kaluaratchi's affidavit was served on the plaintiff's lawyer.

In her affidavit, Ms. Kaluaratchi pointed out that:

(i) the plaintiff and defendant are currently involved in London arbitration in relation to the disputes arising under the Charterparty dated 30 April 1997 in respect of the "Exeter" and that the claim being pursued by the plaintiff in London arbitration amounts to approximately US$685,000.00, its claim being for demurrage, detention and repair cost which the defendant is seriously contesting in the London arbitration;

(ii) the defendant have claims against the plaintiff arising from the same incident which total US$1,118,542.50 and which are currently the subject of proceedings in Sri Lanka. These proceedings in Sri Lanka are being contested by the plaintiff who contests the jurisdiction of the Sri Lanka High Court to hear these claims;

(iii) the plaintiff has recently demanded through its lawyers in London that security be posted in the sum of US$3.9 million;

(iv) the vessel MT "Swallow" commenced loading on 1 October 2000 and finished loading on 2 October 2002. Accordingly at the time the warrant of arrest was applied for and obtained by the plaintiff on 28 September 2002, the cargo was not on board the MT "Swallow" and under the terms of the sale contract with Petronas, was not the property of the defendant;

(v) the defendant had been advised by its London and Malaysian lawyers that s. 20(2)(h) of the English Supreme Court Act 1981 which is relied upon by the plaintiff to justify the arrest is not applicable to arrest cargo

in the circumstances of this case and therefore there is no legal basis for an arrest of the cargo on board the M.T. "Swallow";

(vi) the existence of London arbitration proceedings and the Sri Lankan proceedings have not been disclosed by the plaintiff in its affidavit to lead the warrant of arrest;

(vii) as a result of the arrest of the cargo and the vessel waiting at anchorage at Miri from 2 October 2002, the defendant expected to receive a demurrage claim from the Owner of the MT "Swallow" at a daily rate of US$18,000 per day for the period the vessel was delayed loading together with a claim for detention for the period the vessel continues to wait at the anchorage and prevented from commencing her voyage while the cargo remained under arrest;

(viii) the defendant had been informed by the lawyers representing the Owners of the MT "Swallow" that the vessel will likely miss her next fixture and they would hold the defendant responsible to recover their losses in the region of US$500,000. In the circumstances, the defendant gave notice that it would look to recover from the plaintiff all the claims it faced from the Owner of the MT "Swallow" as well as losses incurred by the Ceypetco refinery for delays in delivery of the cargo to the refinery, arising from the unlawful arrest of the cargo.

On 12 October 2002, Mr. Jussem affirmed an affidavit on behalf of the plaintiff, in reply to the defendant's striking out application to answer what had been said by Ms. Kaluaratchi in her affidavit.

Meanwhile, following the arrest of the cargo on board the MT "Swallow", she was unable to sail from Miri as the port authorities had been notified about the arrest of her cargo. The owners of the MT "Swallow" are Newick Shipping Ltd. of 147/1 St. Lucia Street, Valeter, Malta (hereafter 'the interveners'), who have appointed Dynacom Tankers Management LTD of 94 Vas. Goergion B' Avenue & 2 Nikis Street, 16675 Glyfada, Greece, as managers/managing agents of the MT "Swallow".

On 8 October 2002 a firm of lawyers in Kuching, acting on behalf of the interveners wrote to the lawyers acting for the plaintiff informing them, *inter alia*, that:

(a) at the time of the issue of the writ and warrant of arrest on 28 September 2002 the vessel had not arrived at the designated place of loading in Miri, Sarawak and the cargo had yet to be loaded on board the vessel at the material time;

(b) such arrest was wholly without basis as the court had no jurisdiction *in rem* over this particular cargo under s. 21(2)-(5) of the UK Supreme Court Act 1981;

(c) the arrest of the cargo and continued detention of the vessel had "to date" caused substantial losses and hardship to the interveners as follows:

(i) loss of BP freight fixture	USD385,000.00
(ii) detention at Miri up to 8 October 2002	USD175,000.00
(iii) legal costs	USD100,000.00

(d) loss arising from detention after 8 October 2002 would continue at the rate of USD18,000 per day.

The interveners' lawyers accordingly demanded that the plaintiff's lawyers apply for the release of the vessel from detention and the cargo from arrest with immediate effect. There was no response from the plaintiff's lawyers and so on 10 October 2002 the interveners applied for leave to intervene in this action and thereafter to be granted leave to enter a conditional appearance to enable them to file an application to set aside the writ herein and or the warrant of arrest. Leave was granted to intervene on the same day ie, 10 October 2002.

On 12 October 2002, the interveners filed in their conditional appearance in this action as well as an application seeking orders that the arrest of the cargo was wrongful and or an abuse of process, that the action be dismissed and the warrant of arrest be set aside and that damages be assessed and paid by the plaintiff to the interveners with interest and costs (hereafter "the interveners' application to set aside").

The affidavit in support of the interveners' application to set aside was affirmed by Ms. Despina Chrissi Glyki on 11 October 2002 (hereafter "Ms. Glyki's affidavit'). In her affidavit Ms Glyki disclosed how the interveners became embroiled in the arrest of the cargo, leading to the detention of the MT "Swallow" at Miri. She revealed that the vessel was voyage chartered by the defendant to load a cargo of crude oil from Miri, Sarawak for discharge at Colombo, Sri Lanka. Under the terms of the charterparty, freight was stated to be a lump sum of USD314,400 and demurrage was USD18,000 per day pro rata. Ms Glyki also stated that as a result of the plaintiff's action in arresting the cargo, the interveners have suffered serious hardship and substantial losses. The vessel is the only one owned by the interveners and

therefore its only source of income. As a result of the arrest of the cargo, the vessel was unable to complete its fixture with the defendant. According to Ms Glyki, not only were the interveners deprived of freight due to them under the present fixture with the defendant, the continued detention of the vessel has also caused them to lose their next fixture with British Petroleum. The interveners' losses were those quantified in the interveners' lawyer's letter of 8 October 2002 written to the plaintiff's lawyer, which I have adverted to earlier. Ms. Glyki also stated in her affidavit that Mr. Jussem's affidavit leading to the warrant of arrest contained material inaccuracies in that he had stated in para. 10 that the cargo was laden on board the vessel as of 28 September 2002 when in fact it was not. Ms Glyki further stated that she had been advised by the interveners' London and Malaysian lawyers that there was no legal basis for the arrest of the cargo as the plaintiff's claims against the defendant clearly fall outside the ambit of s. 21(2)-(5) of the Supreme Court Act 1981. Ms Glyki also makes the point that from the affidavit affirmed by Mr. Jussem to lead the arrest of the cargo the plaintiff was itself aware that it only had an in personam claim against the defendant, and that she had been advised by the interveners' Malaysian lawyers that this was clearly not sufficient to found an *in rem* action to arrest property.

The interveners' application to set aside was fixed for hearing on 15 October 2002 ie, on the same date as the defendant's striking out application. A copy of the interveners' application to set aside together with Ms Glyki's affidavit and that of Mr. Leonard Shim affirmed on 12 October 2002 were served on the plaintiff's lawyers on the afternoon of 14 October 2002.

On 14 October 2002, the defendant filed an application to set aside the writ and warrant of arrest ("the defendant's setting aside application"). No affidavit was filed in support of the defendant's setting aside application. Instead the defendant gave Notice of Intention to read Ms Kaluaratchi's affidavit at the hearing of the defendant's setting aside application which was also fixed for hearing on 15 October 2002. The defendant's setting aside application was served on the plaintiff's lawyers on the afternoon of 14 October 2002 with an indication from the defendant's lawyers that on the 15 October 2002, the defendant's striking out application would be withdrawn while the defendant's setting aside application would be proceeded with.

It will be seen from what I have said about the matters raised in the affidavits of Ms Kaluaratchi and Ms Glyki, that the defendant and the interveners rely on more or less the same grounds to set aside the writ and the arrest of the cargo.

On the morning of the hearing on 15 October 2002, counsel for defendant withdrew the defendant's striking out application before the Deputy Registrar. Counsel for the plaintiff raised objections about the defendant's application to set aside being different from its striking out application and requested for an adjournment of the hearing. The Deputy Registrar overruled the plaintiff's objections, refused the adjournment and proceeded with the hearing whereafter the Deputy Registrar allowed the application of the defendant as well as that of the interveners, set aside the writ and warrant of arrest against the cargo and made the orders which I first mentioned in beginning this judgment. Hence, this appeal.

At the hearing of this appeal, the plaintiff took two points which I wish to deal with first.

The first point taken was that when the Deputy Registrar refused the plaintiff's request for an adjournment and proceeded to hear the defendant's setting, aside application, there was a breach of natural justice - the plaintiff was denied due process; that in effect, there was no hearing accorded to the plaintiff on the defendant's setting aside application because the application was served on the plaintiff's lawyers less than 24 hours before the hearing, contrary to O. 32 r. 3 Rules of the High Court 1980 which requires that a summons must be served on the other party not less than 2 clear days before the day specified for hearing. It was also said that no opportunity was afforded to the plaintiff to consider the defendant's application to set aside, give instructions thereon or to respond thereto, particularly so as the defendant's striking out application and its application to set aside proceeded on significantly different grounds, the allegation of malice being introduced for the first time in the defendant's striking out application. It was the submission of counsel for the plaintiff that the discretionary power to grant adjournments should be exercised in the interest of justice - it should not be exercised to defeat the rights of a party and destroy them altogether (see *Mohanlal Gordhandas Sheth v. Ban Guan & Co* [1956] 22 MLJ 13). According to the plaintiff, its rights over the cargo were defeated and destroyed totally by the refusal of the adjournment and resultant release of cargo.

In my judgment the interests of justice would not have been served by the grant of an adjournment by the Deputy Registrar in the circumstances of this case. The MT "Swallow" lay at anchorage at Miri laden with a substantial amount of crude oil but unable to sail because of the arrest of the cargo on board. Every day the vessel lay at anchorage considerable expenses were

mounting. By the time the application came up for hearing, 15 days had lapsed since the arrest was effected. There was therefore a real urgency, as opposed to a perceived one, for the applications before the court to be heard.

Although the plaintiff now complains about not being afforded on opportunity to consider the defendant's setting aside application, give instructions or to respond thereto, in fairness to the Deputy Registrar, this is not what was said before him. The record shows that none of these matters were raised. Instead the objection taken was that once the defendant's striking out application had been withdrawn, the affidavit affirmed in support of it should also be withdrawn whereafter a new or fresh affidavit ought to have been filed, instead of relying on Ms Kaluaratchi's affidavit. The other objection taken was that the defendant's setting aside application was proceeding on jurisdictional grounds whereas its striking out application had sought to strike out the plaintiff's pleadings. The Deputy Registrar overruled these objections because he found that the plaintiff was not caught by surprise by the defendant proceeding with its setting aside application as the defendant continued to rely on Ms Kaluaratchi's affidavit and there were really no new issues raised in the defendant's setting aside application. I do not think the Deputy Registrar can be faulted for having taken the course he did. Given the fact that the defendant continued to rely on Ms Kaluaratchi's affidavit in support of its setting aside application, the plaintiff did have an opportunity to consider all the matters raised in Ms. Kaluaratchi's affidavit because on 12 October 2002 Mr Jussem affirmed an affidavit to reply, point by point almost, the matters raised in Ms Kaluaratch's affidavit. Although the plaintiff complains that the question of malice regarding the arrest of the cargo was introduced for the first time by the plaintiff's setting aside application, I do not think it was caught by surprise because the question of malice is always a relevant factor or in issue whenever the arrest of cargo is challenged. Hence, to support its allegations of wrongful arrest, the defendant relied only on what was stated in Ms Kaluaratchi's affidavit, to which the plaintiff had an opportunity of replying and did do so.

So although the plaintiff complains of being denied due process, when all the facts are considered, they show that the plaintiff had not only availed itself of the opportunity to reply through Mr Jussem's affidavit to all the allegations raised in Ms Kaluaratchi's affidavit but it was also heard fully by the Deputy Registrar on all the issues raised by the defendant. Although the defendant did not comply with the 2 clear days rule under O. 32 r. 3, for the reasons I have already given, I do not think the non-compliance has occasioned substantial injustice to the plaintiff. I accordingly reject this point taken.

The plaintiff's second point was that although the defendant had entered a conditional appearance in this action, it had waived the conditionality of its appearance when it filed its striking out application because in doing so, the defendant was requesting the court to consider the merits of the plaintiff's cause of action. According to the plaintiff, once the defendant had taken this course, it amounted to a submission to jurisdiction whereafter it was no longer open to the defendant to apply to set aside the writ and warrant of arrest on the grounds of absence of jurisdiction. In support, the plaintiff referred to *PP Persero Sdn Bhd v. Bimacom Property & Development Sdn Bhd* [1999] 6 MLJ 1 at p. 22. In that case the defendant filed an application to stay proceedings pending a reference to arbitration but had included in its application a prayer to strike out the plaintiff's writ. In dismissing the application, the learned judge held that the conduct of the defendant in including such a prayer in its application demonstrated a desire to abandon the application for a stay in favour of allowing the matter to proceed to trial, because the effect of such a prayer was to invoke the jurisdiction of the court to proceed to hear the case and not to refer the matter to arbitration.

In further support, the plaintiff also referred to *Kawasaki Kisen Kaisha Ltd v. Owners of the Ship or Vessel "Able Lieutenant"* [2002] 6 MLJ 433 at p. 457, 458. In that case the vessel was arrested as security to meet a claim for loss and damages allegedly suffered by the plaintiff for breach of a Charterparty. The defendant shipowners entered a conditional appearance and thereafter filed an application to:

(a) set aside the writ (on jurisdiction grounds),

(b) strike out the writ of summons,

(c) set aside the warrant of arrest and release the vessel from arrest.

Another company called Pan Ocean Sdn. Bhd. ('Pan Ocean') also entered a conditional appearance, claiming to be beneficial owners of the vessel. Pan Ocean also filed an application to

(a) set aside the writ (on jurisdiction grounds)

(b) strike out the writ of summons under O. 18 r. 19 RHC,

(c) set aside the warrant of arrest and release the vessel from arrest.

In dismissing the applications the learned judge held in respect of both applications, that by applying to set aside the writ on grounds of jurisdiction and also to strike out the writ under the court's summary powers under O. 18 r. 19 RHC, the defendant and Pan Ocean were blowing hot and cold,

wherein on one hand they challenged the jurisdiction of the court and on the other hand sought to invoke the court's jurisdiction to investigate the merits of the plaintiff's claim. So it was submitted on behalf of the plaintiff here that the defendant was not only blowing hot and cold but had elected to have the merits of the plaintiffs case considered when it filed its striking out application, whereafter setting aside the writ was no longer an option available to it.

I regret I do not agree with the plaintiff's contentions. In the first place I agree with counsel for the defendant that unlike the applicants in *PP Persero* and *Kawasaki Kisen*, the defendant here did not proceed with its striking out application. It was withdrawn. When the court entered into a consideration of the defendant's setting aside application, it was not being asked to exercise summary jurisdiction under O. 18 r. 19 and therefore the question of the defendant blowing hot and cold or the court being asked to apply its mind to different considerations in one single application does not arise.

In the second place, and in my view, more importantly, when the defendant raised the jurisdiction issue, the point it was taking is that the Admiralty jurisdiction of this court is statutory and being statutory, the limits of its jurisdiction are circumscribed by the statute which confers that jurisdiction. So it is the defendant's case that if this court lacks admiralty jurisdiction to arrest cargo in the circumstances of this case, such lack of jurisdiction cannot be waived or even made good by an unconditional appearance or submission to the jurisdiction. I agree. The point is well illustrated in *The Ohm Mariana* [1992] 2 SLR 623 at p. 630 where Selvam J said:

> The admiralty jurisdiction of the High Court of Singapore is essentially statutory, namely, the jurisdiction conferred on the High Court by the High Court (Admiralty Jurisdiction) Act (Cap. 123) ('the Act'). The Act lays down the conditions which must be satisfied before a claimant avails himself of the right to institute *in rem* proceedings against a ship and the powerful right to effect an arrest of the ship: **As the *in rem* jurisdiction is created and limited by statute, the parties cannot confer such jurisdiction by agreement or waiver**. (My emphasis)

The basic condition for jurisdiction is that the matter to be heard and determined by the court must be one of the claims enumerated in s. 3(i) of the Act. In the absence of such claims, the court would be acting without jurisdiction. In *Samic Lines Co Ltd v. Owners of the 'Antonis P Lemos'* Lord Brandon, construing the English equivalent of s. 3 of the Act, said (at p. 924):

> If on the one hand, the claim does not come within s. 20(2)(h) of the Act of 1981, the admiralty court, to which the admiralty jurisdiction of the High Court is assigned, has no admiralty jurisdiction, as distinct from any other jurisdiction which it may have, to hear and determine it, and accordingly no power to arrest the vessel as security for such claim ... If on the other hand, the claim comes

> within s. 20(2)(h) of the Act of 1981, the admiralty court has admiralty jurisdiction to hear and determine it, and further, by virtue of s. 21(4) of the same Act, has power to exercise such jurisdiction *in rem* against the vessel.

And at p. 638, Selvam J, continued:

> "It is settled law that where a statute confers a limited and circumscribed jurisdiction, it cannot be enlarged by parties by agreement or otherwise. One can overcome an irregularity but not a nullity. Where a court exercise jurisdiction which it does not possess, the proceedings amount to nothing: see *A-G v. Lord Hotham and Re Dulles' Settlement Trusts; Dulles v Vidler*.

So it is my view that the plaintiff's arguments about the defendant having waived its conditional appearance and lost the right to apply to set aside the writ and warrant of arrest on grounds of absence of jurisdiction, will only be relevant if this court exercises admiralty jurisdiction in respect of the plaintiff's claim herein and has power to exercise such jurisdiction *in rem* against the cargo. For reasons that appear shortly, the plaintiff's arguments are irrelevant as it will soon be seen that the court has no jurisdiction to arrest the cargo.

I now turn to consider the substantive issues raised in this appeal. The plaintiff asks that the orders made by the Deputy Registrar be reversed because on the grounds relied upon by the defendant and the interveners in their setting aside applications respectively, the orders should never have been made. I will first deal with plaintiffs appeal against the orders made on the defendant's setting aside application and the grounds relied upon by the defendant but should mention that the interveners rely on the same grounds as well. The defendant says that the writ *in rem* or warrant of arrest must be set aside because:

(1) if the plaintiff brings its claim under s. 20(2)(h) Supreme Court Act 1981 (hereafter 'the SCA'), it can only proceed against a ship under s. 21(4) SCA and not cargo (the first ground);

(2) the admiralty jurisdiction of the High Court cannot be exercised to obtain security for a claim in arbitration and there was non-disclosure by the plaintiff of the arbitration proceedings (the second ground);

(3) there was no defendant in existence at the time of the issue of the writ nor was the defendant the beneficial owner of the cargo at the time the writ and warrant of arrest was issued and s. 21(4) SCA cannot be invoked (the third ground).

I will consider each of these grounds in turn. With regard to the first ground it is the defendant's case that if the plaintiff's claims give rise a maritime lien, then the plaintiff may proceed against either the ship, aircraft or property

in respect of which the maritime lien has arisen. The defendant further says that in the context of maritime liens, it is clear that cargo is susceptible to arrest only in respect of claims based on salvage, bottomry and respondentia. The defendant goes on to argue that, it is obvious that the plaintiff's claim herein is not in the nature of a maritime lien which attaches to cargo. Consequently, the plaintiff has to proceed under s. 21(4) SCA, which sub-section, if invoked, can only be invoked against a ship and not cargo. The defendant further alleges that the plaintiff was well aware of the fact that cargo (as opposed to a vessel) cannot be arrested pursuant to s. 21(4) SCA because of the clear wording of that subsection, but the plaintiff nevertheless proceeded to do so by transposing the word "ship" with "cargo" in para. 11 of Mr. Jussem's affidavit leading the warrant of arrest. It is therefore the contention of the defendant (and that of the interveners as well) that as no maritime lien exists in respect of the plaintiff's claim and its claim if brought under s. 21(4) SCA, can only be invoked against a ship and not cargo, the manner in which the plaintiff has sought to mislead the court into granting the warrant of arrest is either *mala fide* or grossly negligent.

The plaintiff's response to these arguments is that it has acted correctly in issuing a writ *in rem* and in proceeding to arrest the cargo because its claim against the defendant is two-fold. The first, is for damages and/or an indemnity arising from a breach of a charterparty between the plaintiff and the defendant relating to the hire of a ship ie, the Exeter, and the second, is for the enforcement of an interim arbitration award as to costs arising out of such charterparty agreement relating to the hire of a ship. So it is the plaintiff's case that its claims fall within s. 20(2)(h). SCA by which the High Court shall have jurisdiction to hear and determine "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship".

In respect of the second category of its claim ie, for enforcement of an interim arbitration award as to costs, it is the plaintiff's contention that such a claim has been held in *The Saint Anna* [1983] 1 WLR 895 at pp. 899, 901 to fall within s. 20(2)(h) SCA.

With regard to whether the cargo was susceptible to arrest, it is the plaintiff's contention that the cargo was correctly arrested as "the plaintiff has adopted the Federal Court's recommendation (in *Bangkok Bank Ltd v. Weil Bros Cotton Inc* [1977] 2 MLJ 134) by seeking the issuance of the writ *in rem* and arrest of the cargo to *inter alia* enforce an arbitration award".

In deciding this first ground, it will be necessary to ascertain the admiralty jurisdiction of a Malaysian High Court and how that jurisdiction is exercised

The Admiralty Jurisdiction of the High Court is governed by s. 24(b) of the Courts of Judicature Act 1964 which states:

> Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include:
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

The Admiralty Jurisdiction of the High Court in England, is set out in ss. 20-24 of the Supreme Court Act 1981. Section 20(1) states:

> 20(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say:
>
> (a) jurisdiction to hear and determine any of the questions and claims mention in sub-section (2);
>
> (b) jurisdiction in relation to any of the proceedings mentioned in sub-section (3);
>
> (c) ...
>
> (d) ...

Section 20(2)(a)-(s) then sets out a comprehensive list of all the questions and claims which may be heard and determined by the High Court in the exercise of its Admiralty jurisdiction. As I mentioned earlier, s. 20(2)(h) gives the High Court Admiralty jurisdiction in respect of:

> any claim arising out of any agreement relating to the carriage of goods in a ship or the use of hire of a ship.

Where the Admiralty Court has jurisdiction to hear a claim, it is s. 21 SCA that sets out the mode by which the jurisdiction is exercised ie, by bringing an action in personam or by an action *in rem*. A reading of the section shows that whilst s. 21(1) states that an action *in personam* may be brought in the High Court in all cases which fall within the High Court's Admiralty jurisdiction, it is s. 21(2)-(5) of the SCA which deals with an action *in rem* and the right to arrest property.

Thus, Section 21(1) states:

> 21(1) Subject to section 22, an action *in personam* may be brought in the High Court in all cases within the Admiralty jurisdiction of that court.

Thus, s. 21(2) states:

> 21(2) In any case or any such claim as is mentioned in section 20(2)(a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action *in rem* may be brought in the High Court against the ship or property in connection with which the claim or question arose.

And s. 21(3) states:

> 21 (3) In any case in which there is a maritime lien or other change on any ship, aircraft or other property for the amount claimed, an action can be brought in the High Court against that ship, aircraft or property.

While s. 21(4) states:

> 21(4) In the case of any such claim as is mentioned in Section 20(2)(e) to (r), where:
>
> (a) the claim arises in connection with a ship; and
>
> (b) the person who would be liable on the claims in an action *in personam* ('the relevant person') was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against:
>
> (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all shares in it or the charterer of it under a charter by demise; or
>
> (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner is respects all the shares in it.

And s. 21(5) states:

> 21(5) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action *in rem* may be brought in the High Court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action *in personam*.

At the expense of some repetition, it can be seen, therefore, from what I have set out of the relevant provisions of the SCA that whereas in all cases which fall within the High Court's Admiralty jurisdiction an action *in personam* may be brought by virtue of s. 21(1), an action *in rem* and the right to arrest property is limited to those claims which fall within s. 21(2) - (5).

So the question is, does the plaintiff's claims fall within any of these subsections?

In the present case it is not in dispute between the parties that the plaintiff has not brought a claim *in personam* against the defendant and so s. 21(1) is irrelevant. So too is s. 21(2) as the plaintiff's claims against the defendant does not fall within s. 20(2)(a) - (c) or (s). As far as s. 21(3) in concerned, the defendant says that none of the plaintiff's claims against it under the charterparty fall within the established categories of maritime lien, namely damage done by a ship, salvage, wages master's disbursements or bottomry. In support of what it says, the defendant has referred me to the following passage appearing in Admiralty Jurisdiction and Practice by Migel Meeson (at p. 69):

> (i) cargo: an action *in rem* may be brought against cargo only where the cargo is subject to a maritime lien, as for example in respect of a claim for salvage, or a claim for forfeiture or condemnation of the goods in question or for their restoration after seizure and a claim for droits in Admiralty. Thus, for example, where damage has been received by a ship in collision with another ship, an action *in rem* cannot be brought against the cargo laden on board the wrongdoing ship, even if such cargo belongs to the owner of the wrongdoing ship.

I accept the above statement as correctly stating the law on the right to proceed against cargo by an action *in rem*. Consequently, s. 21(3) is also irrelevant to the plaintiff's claims against the defendant as they do not fall within the sub-section. Section 21(5) is self-evidently irrelevant as it relates to aircraft.

The only relevant provision within which the plaintiff's claim will come is s. 21(4) which encompasses claims mentioned in s. 20(2)(e)-(r). It will be recalled that the plaintiff says its claim against the defendant is brought under s. 20(2)(h) and is two-fold:

(a) for damages and other relief arising from a breach of a charterparty and

(b) to enforce an interim arbitration award as to costs arising out of such charterparty.

While it is my view that the plaintiff's first category of claim does do so, I will assume for the sake of argument only that its second category of claim is a claim arising out of an agreement relating to the hire of a ship, so that both its claims fall within s. 20(2)(h) which in turn would allow the plaintiff to proceed under s. 21(4).

In my judgment, however, it is clear from a reading of sub-s. (4) that the jurisdiction of the court under the sub-section can only be invoked by an action *in rem* against a vessel and not against any other property. I have already when setting out the provisions of s. 21(4) earlier, highlighted the fact that the sub-section mentions that the action *in rem* is brought against "that ship" or "any other ship". It does not mention cargo at all. It is my view that although the claims of the plaintiff may fall within s. 20(2)(h) and that the defendant would be the "relevant person" for the purposes of s. 21(4)(b), the requirements of s. 21(4)(ii) simply cannot be met i.e. that the claim is being brought against "any other ship which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it".

I agree with the defendant that it is quite apparent from the affidavit of Mr Jussem which the plaintiff filed in support of their request for the warrant of arrest that the plaintiff was aware of the requirements of s. 21(4) because Mr Jussem in para. 11 of the affidavit, transposed the word "ship" with "cargo" in an attempt to fit the plaintiff's claim within s. 21(4) and in an attempt to comply with the requirements of O. 70 r. 4(7) RHC which reads:

> Every affidavit in an action *in rem* brought against a ship must state:
>
> (a) whether the ship against which the action is brought is the ship in connection with which the claim in action arose;
>
> (b) that in the belief of the deponent the person who would be liable *in personam* was, when the cause of action arose, the owner or charterer, or in possession or control of the ship in connection with which the claim arose and was also at the time of the issue of the writ the beneficial owner of all the shares in the ship against which the action is brought; and
>
> (c) the grounds of the deponent's belief.

In my judgment, the defendant is correct in its contention that for a claim under s. 20(2)(h) the admiralty jurisdiction of the High Court cannot be invoked against cargo. In having done so in this instance, the court was exercising jurisdiction it did not possess. On this ground alone the writ *in rem* and the warrant of arrest should be set aside.

Returning to the plaintiff's contention that its second category of claim (ie, to enforce an interim arbitration award) falls within s. 20(2)(h) SCA, and that the decision in *The Saint Anna (supra)* is authority for that contention, I find that on the facts of this case, the decision in *The Saint Anna* is of no assistance to the plaintiff. I say so for two reasons. First, in *The Saint Anna*, Sheen J held that if the contract containing the submission to arbitration was within admiralty jurisdiction any claim on the award would also be within the jurisdiction since it can then be said to be a claim "arising out of the "use or hire of a ship". In coming to this decision Sheen J felt free to choose between two decisions of the Court of Appeal on the point in issue before him. In the *The Beldis* [1936] P. 51 the Court of Appeal held that an action *in rem* would not lie to claim a sum payable under an award made in an arbitration held pursuant to a charterparty as such proceedings were brought to enforce the award and did not arise out of the charterparty. A decision going the other way was made by the Court of Appeal in *Bremer Oeltransport GmbH V Drewry* [1933] 1 KB 753, where it was held that an action to enforce an award was indeed based on the contract to submit disputes to arbitration. Sheen J preferred to follow the *Bremer* case rather than *The Beldis*, reasoning that in an action on an award the plaintiff had to prove the award and the agreement which was its basis. Therefore, if the contract containing the submission to arbitration was within admiralty jurisdiction any action on the award was also within the jurisdiction (ie, within s. 20(2)(h) SCA).

However, more recently in the *The Bumbesti* [1999] 2 Lloyds Rep 481, Aikens J had the opportunity to consider whether a claim to enforce an arbitration award comes within s. 20(2)(h) SCA. Aikens J, disagreed with Sheen J, pointing out that in the *Bremer* case the court was not dealing with the proper construction to be put on para. (h) of s. 20(2), and, the crucial question of whether an agreement to refer to arbitration disputes that have arisen out of a charterparty is sufficiently directly related to the use or hire of a ship so as to make the matter fall within para (h) of s. 20(2) was not in issue before the court in the *Bremer* case, but was so in *The Beldis* which decided the point against the claimants. Aikens J, therefore held that he was bound by *The Beldis*. In Aikins J's judgment (at p. 487):

> The agreement to refer to arbitration individual disputes that have arisen out of a charter-party or the agreement to refer future disputes in general that arise out of a charter-party, must be agreements that are directly "in relation to the use or hire of a ship". But in my view, they are not agreements that are sufficiently directly "in relation to the use or hire of a ship". The arbitration agreement is, at least, one step removed from the "use or hire" of a ship. The breach of contract

relied upon to found the present claim has nothing to do with the use or hire of the ship; it concerns the implied term to fulfil any award made pursuant to the agreement to refer disputes. In my view the breach of the contract relied on when suing on an award does not have the "reasonably direct connection with" the use or hire of a ship that Lord Keith held in the Gatoil case was necessary to found jurisdiction under this paragraph: See p. 188 col. 1; p. 271 A-B.

So for the reasons given by him, Aikens J, held that even though an action on an arbitration award clearly "arises out of" the arbitration agreement, that was distinct from the charterparty in which it was contained and therefore is only "indirectly in relation to the use or hire of a ship". Therefore an action on an award is not an action on an agreement which is "in relation to the use or hire of a ship". In other words, an action *in rem* will not lie under para. (h) of s. 20(2) to enforce a claim on an outstanding arbitration award because the alleged breach of contract is not about the use or hire of a ship but is the failure to fulfil or pay an award.

Counsel for the plaintiff urges me not to follow Aikins J, as *The Bumbesti* and *The Beldis* take a narrow interpretation of s. 20(2)(h) SCA, contrary to the view expressed by the House of Lords in the *"Antonis P Lemos"* that the phrase "arising out" of is to be given a wider interpretation which *The Saint Anna* did. It was also said that *The Bumbesti* follows the Court of Appeal decision in *The Beldis*, which decision was not well considered as the Court of Appeal in *The Beldis* was not referred to the earlier decision of the Court of Appeal in the Bremer. It was further said that Sheen J did consider *The Beldis* when deciding *The Saint Anna* but chose to follow the *Bremer* case, and, both *The Saint Anna* and the *Bremer* case have been followed in Singapore and Hong Kong, in preference over *The Beldis*.

I regret I do not agree with the plaintiff. In arriving at his decision, Aikens J, was fully aware of what the House of Lords had said in the *Antonis P Lemos*, and that *The Saint Anna* had been followed in Singapore and Hong Kong, but he considered the basis on which the decisions in *The Beldis* and the *Bremer Oeltransport* had been arrived at and gave his reasons for saying why he was bound by *The Beldis*. Having considered the reasoning in *The Bumbesti* and *The Saint Anna*, I respectfully say that I am more persuaded by that of Aikens J, in *The Bumbesti* and am convinced that I should follow it.

The second reason *The Saint Anna* is of no assistance to the plaintiff is because in that case Sheen J was clearly of the view that in an action on an award the plaintiffs had to plead and prove the award and the agreement which was its basis as essential elements of the plaintiff's cause of action. This is what he said:

In a discussion about the essential elements of an action on an award in *Mustill & Boyd, Commercial Arbitration* (1982), p. 368, the authors say:

> We submit that the better view is that the plaintiff must plead and prove both the arbitration agreement and the award: both are essential elements in his cause of action.

If that statement is accurate, as I think it is, then it seems to me that this action arises out of the charterparty.

Reverting to the facts of our case, a perusal of the plaintiff's claim as indorsed on the writ shows that nowhere did the plaintiff plead the arbitration agreement. Without having done so, I do not think it can be said that both the essential elements in its cause of action have been pleaded to found an action on the award, let alone to arrest cargo on that basis.

With regard to the plaintiff's contention that it had arrested the cargo, because it was relying on the recommendation of the Federal Court in *The Bangkok Bank* case, which, according to the plaintiff, is authority for the proposition that cargo arrest can be maintained even without a maritime lien or charge, I must with all respect say that I do not find this to be so. If the plaintiff had relied on what the Federal Court had said, then I find it strange that the *Bangkok Bank* case and what the Federal Court had there said was never once mentioned or referred to before the learned Deputy Registrar. The fact that it was not leads me to conclude that the plaintiff's reliance on the Federal Court's recommendation in the *Bangkok Bank* case is a mere after-thought on its part.

I also do not agree that the *Bangkok Bank* case is authority for the proposition which the plaintiff says it stands for. In that case the plaintiff had obtained an arbitration award in London. The award was registered as a High Court Judgment in England. Thereafter the plaintiff applied to register the English judgment in Malaysia whereafter the plaintiff commenced execution proceedings by the issue of a writ of seizure and sale against goods (bales of cotton). The Bangkok Bank then intervened in the proceedings and asked for the bales of cotton to be released to them as the bills of lading were made out to their order. The question that arose for determination was who had the better right to the goods. An interpleader summons was subsequently taken out to determine the question but pending the determination of the interpleader summons the learned judge made certain orders which Bangkok Bank were unhappy with and therefore appealed. When the matter came before the Federal Court, Lee Hun Hoe CJ (Borneo) spoke about the proper procedure

where a ship or her cargo was to be seized in execution proceedings. This is what his Lordship said at p. 140, and which is now relied on by the plaintiff:

> Where a ship or her cargo was to be seized the proper procedure would seem to be by way of arrest. Rules 16 and 17 of Order 5 and Order 29 of our Rules of Supreme Court may be relevant. This matter of execution is of particular importance and interest to those concerned in shipping and other related businesses.

With all respect it is my view that what was said by the Federal Court was obiter dicta. The matters under appeal were various orders made by the learned judge pending the hearing of an interpleader summons to decide who had a better right to the goods seized on a writ of seizure and sale. Although the Federal Court spoke about arrest as being the proper procedure where a ship or her cargo was to be seized, the Federal Court was there not speaking in the context of the courts jurisdiction to arrest cargo or the legal and statutory requirements governing the same. Nor did the Federal Court say that cargo was susceptible to arrest even though there was no maritime lien or other charge on the cargo to be arrested. And as pointed out by counsel for the interveners, the Federal Court did not hold that the res need not exist or be loaded on the vessel at the time of the issue of the writ or warrant of arrest.

I will now consider the second ground relied upon by the defendant (and the interveners) to set aside the writ *in rem*. It is the contention of the defendant that in issuing the writ *in rem* the plaintiff had abused the process of court because the admiralty jurisdiction of the High Court cannot be exercised to obtain security for a claim in arbitration. According to the defendant, and I do not think that it can be denied by the plaintiff, a comparison between the Points of Claim, Points of Defence and Points of Reply in the London arbitration proceedings (see exh. KK2 of Ms Kaluaratchi's affidavit), and the indorsement in the writ *in rem* shows that the plaintiff is seeking in this action the same relief as that in the London arbitration. Accordingly, the defendant says the plaintiff's arrest of the cargo is objectionable on two grounds: (a) it is obvious that the real purpose of the arrest of cargo on board the MT Swallow was not to obtain security for the satisfaction of any judgment in this action but is actually to obtain security for the plaintiff's claim currently being pursued in London arbitration and also security for an indemnity claim for any amount it may be obliged to pay the defendant in the Sri Lanka proceedings; (b) failing to disclose in the affidavit leading to the arrest of the cargo a very material fact, namely, that the arbitration in London in which the plaintiff seeks the very same relief as in this action, is being actively pursued by the plaintiff.

In reply to the defendant's complaint that these proceedings were instituted to obtain security for the London arbitration, the plaintiff took three points. First it said that English cases make it clear that the court retains its admiralty jurisdiction over a ship/cargo despite arbitration proceedings and the purpose of invoking admiralty jurisdiction is irrelevant to existence of the jurisdiction. In support I was referred certain passages of the judgment in *The Andria* [1984] 1 All ER 1126 at pp. 1133, 1134, 1135,1136. Secondly, the plaintiff pointed out that its claim is two-fold ie, demurrage for breach of the charterparty and to enforce its interim final award. According to the plaintiff it is only the first category of its claim that remains pending in existing arbitration proceedings. It is the plaintiff's case that any arbitration award on this part of its claim will not be honoured by the defendant. The defendant's failure to honour the interim final award as to costs is evidence of this. So it is the plaintiff's submission that the court has jurisdiction to issue a writ and arrest the cargo, not as security for arbitration proceedings, but as security for satisfaction of the judgment anticipated to be granted in this court in enforcement of an unsatisfied arbitration award. In support the plaintiff cited the following passage in *The Rena K* [1979] 1 All ER 397, at p. 411, 412:

The conclusion with regard to these matters which I reached were as follows.

(1) That the court had no jurisdiction to keep the ship under arrest in order to provide the cargo owners with security for an award in the arbitration. It only had jurisdiction to keep her under arrest in order to provide security for a judgment or settlement in the action ... .

(2) That a stay of the action, not being final, could later be removed for good cause, in which case the action could still proceed to judgment or settlement

The plaintiff also referred me to the following passage in *The Tuyuti* [1984] 2 All ER 543 at pp. 552, 553, where the principle of *The Rena K* was followed:

> ... but the whole point of the principle of *The Rena K* invoked by the cargo owners was that security is provided not for an arbitration award but for judgment in the action *in rem* itself, if the stay of the action should subsequently be lifted after failure by the shipowners to satisfy an award in the arbitration ... .

Thirdly, the plaintiff said that even if the court finds that the admiralty jurisdiction should not be exercised for the plaintiff's claim that are pending arbitration, the court should nevertheless exercise such admiralty jurisdiction to arrest the cargo in enforcement of the interim arbitration award.

Having considered the merits of the plaintiff's contentions, I find that the defendant's objections must be upheld. Having insisted on arbitration in London and actively pursued its claim there, I agree with the defendant that the true purpose of the plaintiff's arrest of the cargo was not to obtain security for the satisfaction of any judgment in this action but to secure its claim in the London arbitration as well as security for its claim to be indemnified in the Sri Lankan proceedings. The law on whether the court's jurisdiction to issue a writ *in rem* and warrant of arrest can be invoked for the purpose of obtaining security for a claim in arbitration is conveniently and usefully set out in the judgment of Lord Justice Goff who delivered the decision of the Court of Appeal in *The Vasso (formerly Andria)* [1984] 1 Lloyds L-R, 235 at p. 243:

> However, on the law as it stands at present, the Court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of an action *in rem*, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: See s. 26 of the Civil Jurisdiction and Judgments Act 1982, which has however not yet been brought into force. But that is not yet the law. It follows that if a plaintiff invokes the jurisdiction of the court to obtain the arrest of a ship as security for an award in arbitration proceedings, the court should not issue a warrant of arrest. Of course, if the plaintiff fails to reveal that arbitration proceedings are being actively pursued and that his purpose is to obtain security for an award in those proceedings, the court may unadvisedly issue a warrant. But for a plaintiff to so proceed may be vexatious and an abuse of the process of the court. Not only has he failed to disclose material facts to the court on an ex-parte application; but he has actively pursued proceedings in court at the same time as actively pursuing arbitration proceedings, which is (unless the plaintiff is seeking, on appropriate evidence, security in the action on the principle in the *Rena K*) vexatious. If so, the court may, on learning of the material facts, order the release of the ship from arrest; and may order the discharge of any security provided consequent upon the arrest".

I do not think the present position in Malaysia is any different from what was stated in *The Vasso* ie, before the enforcement of the UK Civil Jurisdiction and Judgments Act 1982 on 1 November 1984. The *Malaysian High Court Practice 2001*, desk edn contains this commentary at p. 2173:

> In the unreported case of *The Venta* (unreported Supreme Court Civil Appeal No. 02-340-93 (14/12/93), the plaintiff commenced an action *in rem* for the sole

purpose of obtaining security in respect of London arbitration proceedings pursuant to s. 26 of the UK Civil Jurisdiction and Judgments Act 1982 (UK CJJA). The Supreme Court unanimously held that s. 26 of the UK CJJA has no application as s. 24(b) (of our Courts of Judicature Act) only intended to vest the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court under the UK Supreme Court Act 1981. See also *Asia Pacific Parcel Tankers Pte Ltd v. The Owners of the ship or vessel "Normar Splendour"* [1999] 7 CLJ 213.

The *Normar Splendour* was a decision of Abdul Malik Ishak J, who had the opportunity of considering, *inter alia*, in the context of contempt proceedings, whether the admiralty jurisdiction of a Malaysian High Court could be invoked to arrest a vessel for the purpose of obtaining security for an award that may be made in arbitration. In answering that question in the negative, Abdul Malik Ishak J., traced the history of s. 24(b) of the Courts of Judicature Act 1964 and pointed out that the present text of the section was introduced through the Courts of Judicature (Amendment) Act 1987 (Act A 670) which came into force on 22 May 1987. Prior to the amendment, a Malaysian High Court could exercise the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercised by the High Court of Justice in England. However, after the amendment, a Malaysian High Court is to only exercise the same jurisdiction as is had by the English High Court under the United Kingdom Supreme Court Act 1981. The learned judge pointed out that prior to the amendment, a Malaysian High Court's jurisdiction could have been invoked to arrest a vessel for the purpose of obtaining security for the satisfaction of an award which may be given in arbitration proceedings since an English High Court could do so pursuant to the provisions of the UK Civil Jurisdiction and Judgments Act 1982 which had come into force (on 1 November 1984), but the position changed in 1987 after the amendment. This is what Abdul Malik Ishak J said (at p. 692):

Parliament in its wisdom in amending our Courts of Judicature Act 1964 as alluded to earlier saw it fit to limit the use of the admiralty jurisdiction of the High Court. It is now apparent that the admiralty jurisdiction of the Malaysian High Court is confined to the purposes that the admiralty jurisdiction conferred on the High Court of Justice in England by the Supreme Court Act 1981 can be used and that jurisdiction is found in ss. 20 to 24 of the Supreme Court Act 1981 under the heading "Admiralty Jurisdiction". A reading of ss. 20 to 24 Supreme Court Act 1981 shows that there is no power included therein for the High Court to arrest a vessel as security for the satisfaction of an award that may possibly be granted in an arbitration.

Reverting to the issue at hand, from the authorities that have been referred to me and to which I have referred, I conclude that the Malaysian High Court's jurisdiction to arrest a ship or cargo in an action *in rem* cannot be exercised for the purpose of providing security for an award which may be made in arbitration proceedings, unless the plaintiff is seeking security in the action on the principle in *The Rena K*.

This leads me to the plaintiff's second submission ie, that it had instituted these proceedings to seek security on the principle in *The Rena K*. In my judgment the principle in *The Rena K* has no application to the facts of the present case. In my view that principle envisages a situation where after a ship or cargo is arrested in an action *in rem*, the owner applies for a stay of the *in rem* action so that the dispute may be referred to arbitration. In granting such stay the court can order that security be provided, upon being satisfied that if for any reason the order of stay is subsequently lifted, any judgment the plaintiff may obtain in the *in rem* action will remain unsatisfied.

On the facts before me, there is no application for a stay by either the defendant or the interveners. It is quite obvious to me why the defendant has not done so - the matters in dispute between the parties are already before arbitrators in London. The plaintiff themselves have not indicated that they wish to apply for a stay of these proceedings either. Since there is no application for stay, the question of whether security should be ordered in case "the stay of the action" should subsequently be lifted does not arise at all.

With reference to the plaintiff's contention that the court has jurisdiction to issue this writ and arrest the cargo, not as security for arbitration proceedings, but as security to satisfy any judgment anticipated to be granted in this action in enforcement of an unsatisfied arbitration award, I regret that I find this contention untenable because the plaintiff has not even pleaded that it has commenced arbitration proceedings and that it commenced this action in anticipation of the fact that any award it may receive will be unsatisfied. In fact it would seem that in commencing these proceedings *in rem* and arresting the cargo, the plaintiff has put itself into a situation where it is seen to be actively pursuing arbitration in London as well as the action here. According to the decision in *The Vasso*, to proceed in this manner is considered vexatious.

It is also my view that for the principle in *The Rena K* to apply in this case, two other conditions must be satisfied:

(a) the writ must have been indorsed with a claim as justifying the invocation of the admiralty jurisdiction by an action *in rem* and the issue of warrant of arrest. As I have already said, the plaintiff's claim herein do not give

rise to a maritime lien on the arrested cargo and so there was no jurisdiction *in rem* under s. 21(2) to (5) of the SCA for the issue of the writ *in rem* and the warrant of arrest against the cargo. Consequently, there is no jurisdiction for this Court to order a stay of this action; and

(b) there must be evidence to show that if the plaintiff should obtain an award in respect of its claim in arbitration, the defendant would not be able to satisfy it. The plaintiff says that the fact that its interim final award as to costs still remains unsatisfied is sufficient evidence to establish this fact. I regret I cannot agree. Any suggestion that the defendant would be unable to satisfy any award in the arbitration is in my view sufficiently rebutted by the fact that the defendant is financially capable of buying some 40,000 metric tonnes of crude oil valued at some USD7.6 million from Petronas.

With regard to the plaintiff's third submission, ie, that this court should nevertheless exercise its admiralty jurisdiction to arrest the cargo in enforcement of the interim final award as to costs, I regret I do not agree with this submission. It would be contrary to s. 21(3) of the SCA as the plaintiff has no maritime lien or other charge on the arrested cargo in this case.

I now move on to consider whether there was a failure to disclose the arbitration proceedings in London when the plaintiff applied to arrest the cargo. The plaintiff claims that when Mr Jussem deposed in para. 8 of his affidavit leading the warrant of arrest that:

> 8. The plaintiff further claims from the defendant for an arbitration award for costs of GBP17,720.58 as provided under the Interim Final Award dated 20-7-2000. A copy of the Interim Final Award dated 20 July 2000 is exhibited hereto and marked as JJ2.

there was disclosure of the arbitration proceedings at the time of arrest. According to the plaintiff, the fact that the award enforced now is an "interim" award reveals that the remaining claim is pending arbitration.

In *The Vasso*, Goff LJ explained why there should be full and frank disclosure in the affidavit leading to arrest. His Lordship pointed out at p. 241 that while the purpose of the plaintiff in invoking the admiralty jurisdiction cannot affect the existence of the jurisdiction, the exercise of that power is not mandatory but discretionary, and may be affected by the manner in which or the purpose for which, the plaintiff has proceeded. Goff LJ then went on to say at p. 242 that (at that point in time) the court's jurisdiction to arrest a ship should not be exercised for the purpose of providing security for an award which may

be made in arbitration proceedings because the purpose of the jurisdiction is to provide security in respect of the action *in rem*, and not to provide security in some other proceedings, such as, arbitration proceedings. So if a plaintiff invokes the jurisdiction to obtain an arrest as security for an award in arbitration proceedings, it would be an abuse of process if the plaintiff fails to disclose that arbitration proceedings are being actively pursued and that his purpose is to obtain security for an award in those proceedings.

Reverting to the facts before me, I do not think that what Mr. Jussem said in para. 8 of his affidavit amounted to full and frank disclosure. Nowhere in Mr Jussem's affidavit is it disclosed that London arbitration was being actively pursued and that the arrest was to obtain security for it. These are certainly material facts which the court is entitled to be informed about so as to enable it to decide whether to exercise its discretionary power of arrest. Further, the plaintiff stated in its submissions that one of the purposes of these proceedings is to enforce the future arbitration award for its remaining claim for inter alia demurrage and damages which the plaintiff anticipates the defendant will not pay given its present conduct of not paying the interim final award on costs. According to the plaintiff, this future arbitration award would include the indemnity for the Sri Lanka proceedings, as currently sought by the plaintiff in the pending arbitration. If this be so, then surely the plaintiff would want to disclose to the Court that it had instituted the London arbitration and that it was being actively pursued, which it has not.

In the circumstances, I find that although the plaintiff did disclose the interim final award, the plaintiff had abused the court's process in obtaining an arrest of the cargo when the plaintiff failed to make full and frank disclosure of far more material facts, relevant to the exercise of the court's discretion to arrest the cargo.

For all the above reasons the writ and the warrant of arrest should be set aside as well.

I move on to consider the third ground upon which the defendant (and the intervener) say the writ *in rem* and warrant of arrest must be set aside.

It is the defendant's case that there was no defendant in existence at the time of the issue of the writ and warrant of arrest on 28 September 2002, because it is evident from para. 9 of Ms. Kaluaratchi's affidavit that loading only commenced on 1 October 2002. So there was no basis for invoking the *in rem* jurisdiction at that time.

The defendant further says that it is clear from paras. 8 and 9 of Ms Kaluaratchi's affidavit, the transfer of risk and title only passes when the crude oil passes the flange connection between the delivery hose at the loading port and the vessel's permanent hose connection. The loading commenced on 1 October 2002 and finished on 2 October 2002 at 0030 hours. Accordingly title to the cargo only passed to the defendant at that time. The defendant points out that in Mr Jussem's affidavit, the plaintiff state at para. 11 that the defendant "was also at the time of the issue of the writ in this action the beneficial owner of cargo laden on board the ship or vessel MT Swallow" but it is clear from paras. 8 and 9 of Ms Kaluaratchi's affidavit that no right to the cargo existed until the cargo crossed the ship's permanent hose and therefore it is clear that this interest, beneficial or otherwise, did not exist at the time of the issue of the writ.

The plaintiff's response to the defendant's complaint is that it is settled law that the admiralty jurisdiction is invoked only at the time of service of the writ and/or execution of the warrant of arrest, not at the time of the issuance thereof. According to the plaintiff the relevant time to identify the res is the time of service, and not the issuance of the writ. This accounts for the admiralty practice of issuing a writ naming several ships as defendant, when ultimately, the admiralty jurisdiction is invoked only against the one defendant ship upon which the writ is served. The plaintiff says that at the time of service of the writ, the cargo was laden on board the vessel and the defendant was clearly identified as such on the writ and warrant of arrest. Hence the admiralty jurisdiction was properly invoked in this instance. In support, the cases of *The Fordeco* [2000] 1 CLJ 605 and *The Fierbinti* [1994] 3 SLR 864 at p. 873, 874, 876 were cited.

As far as property and beneficial ownership in the cargo is concerned, the plaintiff says that since the cargo had passed the ship's rail at the time of service of the writ and execution of the warrant of arrest, property had passed to the defendant at the material time of service of the writ, and arrest.

Having given this matter anxious consideration, I regret I do not agree with the submissions of the plaintiff. I agree with the defendant that in *The Fordeco* and *The Fierbinti*, the writ issued named more than one ship but that does not detract from the fact that when the writ was issued, the res were in existence. I also agree with the defendant that it is axiomatic that at the time of the issue of the writ, there must be in existence the res against which the action is brought otherwise the whole essence of an action *in rem* is missing - the action *in rem* is commenced against nothing. As held in *The Fordeco*, the action cannot even be started without the existence of the res.

It is true that in *The Fordeco* the Federal Court said that "it is settled law that when a plaintiff brings an action *in rem*, the jurisdiction of the High Court is invoked, not when the writ is issued, but when it is served and the warrant of arrest executed", but the Federal Court did also go on to say that "the issue of the writ may be the start of the invocation of the jurisdiction, but the invocation is not complete until the writ is served or deemed to have been served as a result of the entry of appearance by the defendant before service is effected", and so I do not think it is completely accurate to say that the relevant time to identify the res is the time of service and not the issuance of the writ.

As far as ownership of the cargo is concerned, it is my view that the relevant time to determine this is when the action is filed and the warrant of arrest issued and not when executed. By analogy, where an action is brought against a ship, s. 21(4) SCA requires that the relevant person ie, the defendant must be the beneficial owner of the ship at the time when the action is brought. And in *The Ohm Marina* it was held at (2):

> If there is no maritime lien, there are two further requirements that must be satisfied before invoking the *in rem* jurisdiction: firstly, it must be shown that the person who would be liable on the claim was, when the cause of action arose, the owner or charterer of, or in possession or control of, the ship; secondly, it must be shown that at the time the action was filed, the person so liable was the beneficial owner of the ship against which the admiralty jurisdiction is being invoked.

I cannot think of any good reason why it should be any different when the action is brought against cargo that the relevant person ie, the defendant must be the beneficial owner of the cargo at the time when the action is brought.

So on this ground also, I would set aside the writ and warrant of arrest.

The defendant has also submitted that the warrant of arrest should be set aside because the affidavit leading to the warrant of arrest is inadmissible. It was so because Mr. Jussem is an advocate practicing in the firm acting for the plaintiff and so would have no personal knowledge of the facts leading to the claim. The defendant says Mr. Jussem has affirmed to facts outside his personal knowledge without specifying any sources of his information and belief. It was submitted that without Mr. Jussem's affidavit, the plaintiff is unable to satisfy the requirements of O. 70 r. 4(6)(b) which provides that the affidavit must state the nature of the claim and that it is unsatisfied.

I regret I find no substance in this complaint. A fair reading of Mr. Jussem's affidavit shows that he reveals the source of information where relevant, such as, for example, that he obtained information about the claims in respect of the Exeter from a report received from the Master of the ship; and about the plaintiff's claim for the costs of the arbitration award from a copy of the Interim Final Award; and about the MT Swallow's arrival, from information by the Miri Port Authority.

It follows from what I have said so far that I see no reason to disturb the orders made by the learned Deputy Registrar in setting aside the writ and the warrant of arrest at the instance of the defendant.

I move on now to consider the plaintiff's appeal against the learned Deputy Registrar's order that the plaintiff pay damages to be assessed to the defendant for the wrongful arrest of its cargo.

The principles relating to whether the court should award damages for the wrongful arrest of cargo, where the arrest is set aside is well established. It is to be considered and awarded only when malice, or gross negligence amounting to malice is shown on the part of the arresting party. See *The Evangelismos* 14 ER 945 at pg 948. In *The Maule* [1995] 2 HKC 769 Bokhary JA said:

> The test to be applied in deciding whether or not to order an inquiry as to damages for the wrongful arrest of a ship was stated in these terms by the Privy Council in *The Evangelism*os [1858] 12 MOO PC 352 at 359:
>
> > ... is there or is there not, reason to say, that the action was so unwarrantedly brought, or brought with so little colour, or so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it?
>
> As I see it, it comes to this. If a plaintiff wrongfully arrested a ship which he knew he could not legitimately arrest, then he would be acting in bad faith. And short of that, if he wrongfully arrested a ship without applying his mind to whether there was a legitimate course: proceeding in that cavalier fashion because he was bent on harming the shipowner or putting pressure on him to accede to a demand, then his conduct would, in my view, be described as malicious negligence. And in either case, damages for wrongful arrest would be a proper remedy to grant the shipowner against him.

It is the plaintiff's contention that there is simply no evidence of malice or ulterior or collateral motive on its part and so the order of assessment of damages in favour of the plaintiff must be reversed with costs. According to the plaintiff the arrest of cargo is not an everyday occurrence in Malaysia. In the light of the Federal Court decision in *The Bangkok Bank* case, the arrest of cargo in this instance cannot be considered negligent, let alone grossly negligent so as to amount to malice. The plaintiff says that it did not know that they could not legitimately arrest the cargo, nor was it 'cavalier' about the arrest. The plaintiff having sought legal advice from 3 sets of solicitors in London, Kuala Lumpur and Kuching had moved with great caution and were under the honest belief that they could legitimately arrest the cargo, which belief it says could have been guided by the Federal Court decision in The *Bangkok Bank* case and if the Federal Court was wrong the plaintiff can hardly be penalised in damages for the arrest. It is the plaintiff's submission that branding its conduct which was legally advised, as malicious in this instance would not only be unfair but, wholly unwarranted. The plaintiff also says that its request for security in the sum of USD3.9 million cannot be considered as evidence of malice because it is entitled to seek security for its best arguable case. The plaintiff considers its claim for USD3.9 million to be so arguable. According to the plaintiff, the defendant is at liberty to challenge the quantum of security and to seek from the court its reduction. In my judgment the plaintiff's conduct in this case certainly affords reason to say that there was malice or gross negligence amounting to malice on its part in bringing this action and arresting the cargo. The conduct of the plaintiff which I refer to is that which has been identified by the defendant (and the interveners) in its submission and with which I fully agree. The following facts are pertinent:

(i) Having already commenced arbitration proceedings in London and prosecuted the proceedings up to the point of an interim award, the plaintiff commenced a suit for the same causes of action and the same relief here, predominantly to obtain security for any award that may be made in arbitration. This is done without disclosing in its affidavit that the arbitration in London is for the same causes and relief. The fact that security is being sought for not only the claim in arbitration but also what the plaintiff may have to pay the defendant for the Sri Lankan proceedings show its purpose which is to obtain security for those other proceedings and not for the present proceedings and as was said in *The Vasso*, this is an abuse of process. In my judgment this was done knowingly by the plaintiff as the law relating to arrest for obtaining security for arbitration is clear and unequivocal.

(ii) The plaintiff knew that s. 21(4) SCA only allowed the action *in rem* to proceed against a ship and not cargo. This can be readily inferred from the fact that Mr. Jussem transposed the word "ship" to "cargo" in an attempt to fit the plaintiff's claim into s. 21(4) SCA and O. 70 r. 4(7) RHC.

(iii) In my judgment the plaintiff was negligent in issuing the writ and warrant of arrest at the time when there was no defendant. Mr. Jussem's affidavit shows, in paragraph 12, that the plaintiff's information was that the vessel will be loading 40,000 tonnes of light crude oil on 28 September 2002 at 12 noon. Given that fact, and the further fact that the court Bailiff returned from Miri on 29 September 2002 because he could neither serve the writ nor effect the arrest of the cargo on 28 August 2002 it should have been apparent to the plaintiff or their legal advisers that there was no proper defendant at that stage.

In the circumstances I find that the test propounded in *The Evangelismos* is made out in that the action was so unwarrantedly brought, or brought with so little colour or so little foundation, that it implies malice on the part of the plaintiff, or that gross negligence which is equivalent to it.

The plaintiff says that it relied on *The Bangkok Bank* case but I have already said why I do not think that they did. The plaintiff also says that it was being advised by 3 sets of lawyers in London, Kuala Lumpur and Kuching but the requirements and extent of s. 21(4) SCA is clear and the plaintiff and its legal advisers were put on notice shortly after the arrest by the defendant's lawyers in Kuching and London that there was no basis for the arrest. Yet the plaintiff persisted with the arrest. I agree with the defendant that the conduct of the plaintiff clearly shows that it was trying to use the arrest to exert commercial pressure to obtain security for claims wholly unconnected with Malaysia.

For all the above reasons the Deputy Registrar's order of assessment must stand and is affirmed.

I will now deal with the plaintiff's appeal against the orders made by the learned Deputy Registrar on the application of the interveners, namely, that the plaintiff's action and warrant of arrest be set aside (hereafter the interveners' setting aside order') and that damages be assessed and paid to the interveners (hereafter 'the interveners' assessment order').

The plaintiff says the interveners' setting aside order is wholly erroneous and must be reversed on two grounds:

(1) it was made in breach of the principles of natural justice;

(2) the interveners have no *locus standi* to set aside the writ nor any right or justification to set aside the warrant of arrest.

With regard to its first ground, the plaintiff complains that as no separate hearing on the interveners' setting aside application was held, nor consideration given, before it was allowed with costs. Accordingly the plaintiff complains that it was not heard at all on the interveners' setting aside application - a blatant disregard of the principles of natural justice. The plaintiff further complains that the interveners' setting aside application was served on its solicitors on the afternoon of 14 October 2002 which was less than 24 hours before the hearing, which is a breach of the 2 clear days rule housed in O. 32 r. 2 RHC. Since its application for an adjournment was refused by the Deputy Registrar the plaintiff repeated here what it had said on the matter earlier when arguing its appeal against the defendant's setting aside application.

I regret I do not agree that the plaintiff was not accorded due process in respect of the interveners' setting aside application.

With regard to the Deputy Registrar's refusal to grant the adjournment requested and the breach of the 2 clear days rule in O. 32 r. 2 RHC, I have already expressed my views on the matter and no purpose would be served to repeat them again.

With regard to the plaintiff's complaint about there being no separate hearing conducted in respect of the interveners' setting aside application, the two applications before the Deputy Registrar were being heard together. As the interveners' application was in the same terms as the defendant's and as the interveners relied on the same grounds and arguments relied upon by the defendant, whatever arguments the plaintiff had made in opposing the defendant's application would have applied to the interveners as well. So although in form there may not have been two separate hearings, in substance the plaintiff was being heard on both applications as the arguments were common to both applications. It is understandable therefore that on finding that the defendant's arguments had succeeded, the Deputy Registrar would go on to make a similar order in respect of the interveners' application as well.

I also take into account that this appeal proceeds before me by way of an actual rehearing in every sense of the word so that any points that were not taken or heard before the Deputy Registrar may be taken and heard before me. Since I am not bound by the decision of the Deputy Registrar (although

I should give his decision the weight it deserves), I must decide afresh and for myself all the matters that have been raised for decision in this appeal. In that sense also, the plaintiff has not been deprived of an opportunity of being heard.

With regard to the plaintiff's second ground, it is the plaintiff's contention that the interveners have no *locus standi* to apply to set aside the writ because the rights of the intervener are limited to the protection of their interests in the cargo.

Their rights, so say the plaintiff, do not extend to all rights of the original defendant and the interveners cannot assert the defendant's rights; particularly when the defendant itself has appeared to do so. According to the plaintiff the interveners cannot in any event prosecute their claim in this action (see *Pemunya Kapal MV Brihope v. Emmanuel E Okwuosa & Ors* [1996] 4 CLJ 461 CA).

The plaintiff also referred me to the following passage in *Admiralty Jurisdiction & Practice*, by Nigel Meeson at p. 144:

> However, the right of a person who has been made a party under this provision is limited to the protection of his interest in the res and the court will not permit him to raise extraneous issues.

The plaintiff says that the interveners chose not to seek the discharge of the cargo, which they should have done. According to the plaintiff, no attempt was made by the interveners to seek directions from court to alleviate their hardship, which hardship evidenced by the interveners' affidavits, is inability to sail and earn freight. The plaintiff says that the interveners' application to set aside is not in preservation of their interest in the cargo arrested, but in preservation of their interest in the freight and demurrage. The interveners made a choice to earn freight on the contract between themselves and the defendant, so they cannot complain of hardship or loss - they caused their loss.

In my judgment the interveners did have *locus standi* to apply to set aside the writ. As shipowners their interest in the arrested cargo is their possessory lien for freight and demurrage. Further, they have an interest to deliver the said cargo to collect freight from the shipper ie, the defendant. The interveners clearly have an interest to protect. While the plaintiff attacks the interveners' decision not to apply for a discharge of the cargo as indicative of the interveners' preference instead to earn freight on the contract, I do not think it can be denied that the interveners' application to set aside the writ and arrest

of the res is in fact a step to protect their interest in the same. While I agree that the interveners did have a choice of what to do, they obviously decided, (as seen from the grounds of their application), that the action *in rem* and the arrest of the cargo was so fundamentally flawed that the most effective way to mitigate their hardship and loss would be to file their setting aside application. In having done so, can it be said that the interveners were not acting to protect their interest in the cargo? In my view they certainly were. And I find that in doing so, the interveners had not raised any extraneous issues. Neither do I see them as prosecuting their claim in this action when they complain that the plaintiff's action is so fundamentally flawed that it must be set aside.

In support of its submission that the interveners had no *locus standi* to apply to set aside the writ, counsel for the plaintiff referred me to a passage in the judgment in *The "San 003"* [1979] 2 MLJ 8 where the learned judge said that:

> counsel has not been able to satisfy me that there is any reported case of an intervener having applied to a court and obtained an order to set aside a writ of summons.

I agree with counsel for the interveners that the outcome in *The "San 003"* would, most probably be different in light of two later cases, *The "Mawan" now named "Mara"* [1988] 2 Lloyd's Rep 459 and *The Hull 308* [1991] 1 SCR 304.

In *The "Mawan"*, the interveners (the new owners of the vessel), applied for an order that the writ and the warrant of arrest be set aside and the security released on the ground that the plaintiffs had failed to show that at the time the action was brought, the "relevant person" as defined in s. 21(4) of the Supreme Court Act 1981, was the beneficial owner of the vessel. In short, the plaintiffs in The "Mawan", as with the plaintiffs in the present suit, failed to comply with the statutory requirements for arresting vessels (cargo in the present case). The English High Court accordingly set aside both the writ and the warrant. In *The Hull 308*, the plaintiffs took out the writ *in rem* against the vessel, after commencement of the winding-up of the defendants. The Singapore Court of Appeal in that case upheld the High Court's decision to set aside the writ of summons with costs to the defendants and interveners.

I agree with the interveners that the above cases show that there is, in principle, no reason why a court should not set aside a writ on an interveners' application, especially where the writ is fundamentally flawed to begin with.

The plaintiff also submitted that the interveners were at liberty to seek an order of court for the discharge of the cargo whereupon the vessel could have sailed without impediment, yet the interveners chose to retain the cargo on board and to move the move the court 12 days later to challenge the issuance of the writ and warrant of arrest. The suggestion here is that the interveners deliberately chose not to discharge cargo and delayed for 12 days before making their application to set aside. I do not accept this submission. The court file shows that the interveners filed two certificates of urgency on 10 October and 12 October 2002 respectively, requesting for their application to be heard. They had done whatever was necessary to obtain an early hearing date. In view of the fact that the defendant's setting aside application was already fixed for hearing on 15 October 2002, it is highly unlikely that their application would have been fixed any earlier. The plaintiff's submission also overlooks the fact that since 8 October 2002 the interveners' lawyers had written to the plaintiff's lawyers trying to obtain a release of the vessel. So the suggestion that the interveners delayed for 12 days is inaccurate.

With regard to the plaintiff's submission that the interveners cannot assert the defendant's rights when the defendant themselves have appeared to do so, counsel for the plaintiff referred me to certain passages of the judgment in *The Brihope* [1996] 4 CLJ 476. With respect I do not agree that the passages I was referred to support the plaintiff's contention. In that case, summary judgment was given in favour of the plaintiffs because the defendants had failed to file an affidavit in reply within 14 days of the plaintiff's service of the writ as mandated under O. 32 r. 13(2) RHC and only did so one day before the hearing of the plaintiff's application for summary judgment. The judge in that case refused to allow the defendant's affidavit to be used and ordered in terms of the application. The Court of Appeal upheld the learned Judge's decision and held that the defendant's delay in the matter were "perverse" and that the affidavit in support was rightly rejected. In the same case, the interveners intervened in the action after the summary judgment proceedings and applied for the judgment to be set aside. The Court of Appeal held that the interveners could have intervened before the application for summary judgment was heard but elected not to do so. In the event, they were estopped from applying to set aside after summary judgment was passed. In light of the fact that the

defendants themselves had effectively failed to defend the action, the Court of Appeal held that (at p. 497):

> ... if the intervener came in good time, he could defend the action in place of the owner, if the owner himself failed to appear. If he was attempting to set aside a final judgment to which he was not a party, he cannot take defences which the owner had not taken because he was no longer defending the claim in place of the shipowner. All he could do now was to assert his interest but the judgment *in rem* must stand as it did.

Similarly, in the case of *The Byzation* [1922] 16 Asp MLC 18; 127 LT 756, which was cited in *The "Brihope"*, the defendant failed to appear to defend the action. In that context, the court held that

> if the intervener came in good time, he can defend the action in place of the owner if the owner fails to appear.

These two cases therefore do not stand for the proposition that the interveners cannot assert the defendant's right in the event the defendant himself has entered an appearance to do so.

The plaintiff also submitted that as the defendant here had itself applied to set aside the writ and warrant of arrest, the interveners are guilty of multiplicity when they filed their application to set aside as well. I regret I do not agree with this argument. In my view intervention prevents multiplicity of actions. In *The Brihope*, the Court of Appeal said at p. 488:

> The object of permitting intervention is to prevent multiplicity of actions and to enable the court to determine disputes between all parties to them in one action and to prevent the same or substantially the same questions or issues being tried twice with possibly different results ... .

I finally deal with the plaintiff's appeal against the order of assessment of damages made in favour of the interveners. The plaintiff contends that the order is misconceived and unprecedented. The plaintiff makes the point that the interveners are not a party it is proceeding against and as reiterated in *The "Maule"*, the principle for the award of damages in relation to an arrest is similar to an action for malicious prosecution. The plaintiff says that there must therefore, at the very least, have been an action brought unsuccessfully, by the plaintiff against the interveners, before a cause of action for malicious prosecution may be advanced, and damages claimed by the interveners against the plaintiff.

I regret I do not agree with the above submission. The interveners are already a party to this action and they have suffered hardship and loss as a result of the arrest of the cargo. In *The Brihope* [1996] 4 CLJ 476, the Court of Appeal held that:

> Intervention in admiralty proceedings *in rem* is covered by Ord. 70 r. 16 of the Rules of the High Court (which is similar to but not in *pari material* with the English O. 75 r. 17). These differences are not material to our present purposes. Under our rules the intervener applies *ex parte* for leave to appear and having obtained leave is treated as if he were a defendant in the writ.

I agree with the interveners that between the three parties ie, the plaintiff, defendant and the interveners, it is the interveners who are the innocent party - they have no dispute with the plaintiff or the defendant which has brought about the arrest of the cargo, but it is they who have suffered the most hardship loss and damage arising from the wrongful arrest of the cargo and defacto arrest of the MT Swallow. From a review of the cases which I have been referred to on the point, where the res is arrested under a mistake of fact or law but bona fide, the law will not punish. But where the arrest has been made in bad faith or with crass negligence, the giving of damages is justified. The question is, does that justification case to operate or apply where it is not just the defendant but also an intervener who has an interest in the res which is affected? In my judgment if the defendant here is entitled to an order of damages upon its application to set aside, I see no reason why the interveners here who rely on the same grounds and objectionable conduct of the plaintiff, should not be entitled to a similar order for damages on their application to set aside.

With reference to the plaintiff's contention that the order for damages in favour of the interveners in unprecedented, counsel for the interveners has referred me to *The San 003*, in which the Singapore High Court held that "in the circumstances of this case, there will be no order on prayer three", which was the intervener's prayer for damages for wrongful arrest. It is clear to me from the above passage that the learned Judge would have awarded damages to the interveners there in the appropriate circumstances. I agree with the interveners that in the present case the appropriate circumstances are present. The interveners rely on the same facts as the defendant does to show that the plaintiff's conduct in commencing an action *in rem* against and arresting the cargo which the interveners had an interest in, clearly points to malice or gross negligence amounting to malice and everything I said about the matter when dealing with the defendant's case will apply with equal force here.

It follows from what I say that I see no reason to disturb the order of assessment of damages made in favour of the interveners.

In the result I dismiss the plaintiff's appeal with costs and confirm all the orders made by the learned Deputy Registrar except his order as to costs on the plaintiff's application to amend its warrant of arrest. I will hear the parties on what order I should make.